Supreme Court, U. S.
FILED
OCT 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-613

RICHARD CLEVELAND NOLAN , Petitioner

v.

NATIONAL TRANSPORTATION SAFETY BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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The Petitioner, Richard Cleveland Nolan, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 25, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not reported and not selected for publication, appears in the appendix hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth Circuit was entered on July 25, 1977. Petitioner petitioned the Court of Appeals for the Tenth Circuit for reconsideration of that judgment and order on August 8, 1977, pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Petitioner's petition for reconsideration was denied by the Court of Appeals on August 30, 1977. This petition for certiorari was filed within 90 days of the date of entry of the judgment and opinion and within 60 days of the date of denial of the petition for reconsideration. This Court's

jurisdiction is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Appeals required, on review of adjudicatory actions of administrative agencies, to make specific findings as to whether or not each finding of fact of the Administrative agency is supported by substantial evidence in the record, when the basis of the appeal is a challenge to the sufficiency of the evidence to support certain specified agency findings of fact?

2. Did the Court of Appeals, in the present case, abdicate its statutory responsibility under the Federal Aviation Act of 1958, as amended, and the Administrative Procedure Act, as amended, to independently weigh the evidence and make its own findings as to whether or

not the findings of fact of the Board were supported by substantial evidence in the record?

CONSTITUTIONAL, STATUTORY, AND REGULATORY AUTHORITIES

U.S. Const. Amend. V:

> No person shall be...deprived of life, liberty, or property, without due process of law...

Federal Aviation Act of 1958, § 609, (49 U.S.C. § 1429):

> (a) The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility

certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order until the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the

immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings.

Federal Aviation Act of 1958, § 1006:

(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this sec-

tion shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

* * *

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of tital 28, United States Code.

Administrative Procedure Act of 1966, by U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

* * *

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

* * *

> In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.32:

> In proceedings under section 609 of the Act, the burden of proof shall be upon the Administrator.

Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.49:

> On appeal, the Board will consider only the following issues:
> (a) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence?
> (b) Are conclusions made in accordance with precedent and policy?
> (c) Have any prejudicial errors occurred?

* * *

STATEMENT OF THE CASE

1. Nature of the Case and Prior Proceedings.

This is a petition for writ of certiorari under 28 U.S.C. § 1254 (1) from a decision of the United States Court of Appeals for the Tenth Circuit entered on July 25, 1977, which affirmed an order of the National Transportation Safety Board. The order revoked the commercial airplane pilot certificate of the Petitioner, Richard Cleveland Nolan.

On February 10, 1976, the Federal Aviation Administration issued an order revoking Mr. Nolan's commercial airplane pilot certificate for alleged violations of the Federal Aviation Regulations and for allegedly having failed to exercise the degree of care, judgment, and responsibility required of the holder of an airman's certificate and for having

demonstrated a lack of qualifications required of the holder of an airman certificate. Mr. Nolan appealed the order of revocation to the National Transportation Safety Board.

A hearing was held before an Administrative Law Judge of that Board on June 16, 1976, in Denver, Colorado. Upon completion of the presentation of the Federal Aviation Administration's case, counsel for Mr. Nolan moved to dismiss the Administrator's complaint (the order of revocation) on the grounds that the Administrator had failed to carry his burden of proof by establishing a prima facie case as to each of the facts alleged in that complaint. The Administrative Law Judge overruled the motion and affirmed the Administrator's order revoking Mr. Nolan's commercial airplane pilot's certificate.

Mr. Nolan appealed this initial decision of the Administrative Law Judge to the full National Transportation Safety Board. On October 20, 1976, the Board issued an order affirming the order of revocation and the initial decision of the Administrative Law Judge. Mr. Nolan petitioned the Board for reconsideration of that order, but that petition was denied by the Board on January 5, 1977. Mr. Nolan sought review in the United States Court of Appeals for the Tenth Circuit. Mr. Nolan argued, on appeal, that the findings of fact of the Board are not supported by a preponderance of reliable, probative and substantial evidence and that the Board's conclusions are not in accordance with Board precedent and policy. On July 25, 1977, the Court of Appeals issued its opinion affirming the order of the Board, with-

out making a finding as to whether each of the Board's findings of fact are supported by substantial evidence. On August 8, 1977, Mr. Nolan petitioned the Court of Appeals to reconsider that opinion on the ground that the opinion did not state such a finding. On August 30, 1977, the Court of Appeals denied this petition for rehearing.

2. The Material Facts.

(a) The Petitioner. Richard Cleveland Nolan is a 66-year old commercial pilot who has amassed approximately 40,000 hours of flying time as pilot-in-command over an aviation career spanning some 41 years since he began flying in 1936. He owns and operates a used aircraft dealership, Dick Nolan Aircraft, Inc., at Greeley, Colorado.

(b) The Violations Charged. In its order of revocation, which served as its

complaint in this case, the Federal Aviation Administration charged that Mr. Nolan had operated an aircraft as pilot-in-command on a passenger carrying flight in the vicinity of Sterling, Colorado, at an altitude of 20,000 feet. The FAA further charged that the aircraft was not equipped with a transponder with automatic pressure altitude reporting capability.

The FAA charged that these alleged acts violated the following provisions of the Federal Aviation Regulations:

> 14 C.F.R. § 91.24
>
> (b) Controlled airspace: all aircraft.--Except for persons operating helicopters in terminal control areas at or below 1,000 feet AGL under the terms of a letter of agreement, and except for person operating gliders above 12,500 feet m.s.l. but below the floor of the positive control area, no person may operate an aircraft in controlled airspace, after the applicable dates prescribed in paragraphs (b)(1) through (b)

(4) of this section, unless that aircraft is equipped with an operable coded radar beacon transponder having a mode 3/A 4096 code capability, replying to mode 3/A interrogation with the code specified by ATC, and is equipped with automatic pressure altitude reporting equipment having a mode C capability that automatically replies to mode C interrogations by transmitting pressure altitude information in 100-foot increments. This requirement applies--

(1) After January 1, 1975, in Group I Terminal Control Areas governed by § 91.90(a);

(2) After July 1, 1975, in Group II Terminal Control Areas governed by § 91.90(b), except as provided therein;

(3) After July 1, 1975, in Group III Terminal Control Areas governed by § 91.90(c), except as provided therein; and

(4) After July 1, 1975, in all controlled airspace of the 48 contiguous States and the District of Columbia, above 12,500 feet m.s.l., excluding the airspace at and below 2,500 feet a.g.l.

and

14 C.F.R. § 91.97 (a) (1):

(a) Except as provided in paragraph (b) of this section, no person may operate an aircraft

within a positive control area, or positive control route segment designated in Part 71 of this chapter, unless that aircraft is--

(1) Operated under IFR at a specific flight level assigned by ATC;

(2) Equipped with instruments and equipment required for IFR operations;

(3) Flown by a pilot rated for instrument flight; and

(4) Equipped, when in a positive control area, with--

(i) A coded radar beacon transponder, having at least a mode A (Military Mode 3) 64-code capability, replying to mode 3/A interrogation with the code specified by ATC, except that, after the applicable dates specified in paragraphs (a) and (b)(3) of § 91.24, the applicable provisions of that section shall be complied with.

The FAA further alleged that Mr. Nolan had failed to exercise the degree of care, judgment, and responsibility required of the holder of an airman's certificate and had demonstrated a lack of qualifications required of the holder of an airman certificate.

3. Decision of the Administrative Law Judge.

The Administrative Law Judge found that the Administrator has established by a preponderance of the evidence all of the allegations set forth in his complaint and that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order of revocation.

4. Decision of the National Transportation Safety Board.

On October 20, 1976 the National Transportation Safety Board denied Mr. Nolan's appeal and affirmed the Administrator's order and the initial decision revoking his commercial pilot certificate.

The Board adopted the findings of the Administrative Law Judge as its own.

5. Decision of the Court of Appeals.

On July 25, 1977 the Tenth Circuit

affirmed the Board's opinion revoking Mr. Nolan's commercial pilot certificate.

The court of appeals found that the Board's action was in accordance with the law and was within the discretion vested in it. The only evidence as to whether or not the aircraft was equipped with a transponder having the required altitude reporting capabilities came from FAA witness Derek Lucas, who piloted the aircraft on at least a portion of the flight. Mr. Nolan specifically challenged the substantiality of this evidence as inadequate to support the finding by the Administrative Law Judge and the Board that his aircraft was not properly equipped. The court of appeals refused to weigh the substantiality of this evidence deferring entirely to the province of the Administrative Law Judge as though the only question before it

were one of credibility, and not of substantiality. (Opinion of the Court, at 4).

ARGUMENT

A. Introduction and Summary.

The court of appeals is clearly in error and has repudiated its statutory duty by failing and refusing to independently examine and weigh the evidence and render its own independent finding as to whether or not each of the findings of fact of the Board is based upon substantial evidence.

This refusal to rigidly apply the "substantial evidence" test operates to deny Petitioner his right to due process of law as guaranteed by the due process clause to Amendment V of the Constitution of the United States.

B. Applicability of Due Process Guarantee.

The Fifth Amendment to the Constitution of the United States does provide that "no person shall. . . be deprived of life, liberty, or property, without due process of law." Included within the concepts of liberty and property is the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference. Greene v. McElroy, 360 U.S. 474, 492 (1959). Those fundamental requirements of fairness which are the essence of due process in a proceding of a judicial nature are also required in administrative adjudicatory hearings. An administrative adjudicatory hearing which does not afford such fundamental protections is fatally defective. Morgan v. United States, 304 U.S. 1, 18-22 (1938). Indeed, the manifest purpose in requiring

a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. Shields v. Utah Idaho Central R. Co., 305 U.S. 177, 182 (1938). Due process in administrative proceedings of a judicial nature has been said generally to require conformity to fair practices of Anglo-Saxon jurisprudence. Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1965). The right to a fair and open hearing conforming the prerequisites of due process is assured to all parties by the due process clauses of the U. S. Constitution and cannot be compromised by administrative agencies. Ohio Tel. Co. v. P.U.C., 301 U.S. 292 (1937). Adjudicatory administrative proceedings required by statute must conform to the requirements of the Administrative

Procedure Act if resulting orders are to have validity. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

In our legal system, the only evidentiary hearing available in air safety proceedings is before the Administrative Law Judge of the National Transportation Safety Board. It is, therefore, absolutely essential that the requirements of due process be honored, and not receive mere lip service, in such hearings.

Congress has entrusted to the Courts of Appeals the duty to determine, on review of adjudicatory proceedings of administrative agencies, whether the record discloses substantial evidence to support the agency's findings. Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 491 (1951). This is the only check provided by law to assure that persons

subjected to the punitive actions of administrative agencies have not suffered administrative sanctions without a substantial evidentiary showing of good legal cause therefore.

C. Scope of Review.

The Courts of Appeals are strictly limited by statute in reviewing the evidentiary basis of decisions of the National Transportation Safety Board in cases of this nature. The Federal Aviation Act of 1958, as amended, provides at 49 U.S.C. § 1486(e) that the Board's findings of fact are conclusive, if supported by substantial evidence. The Administrative Procedure Act, at 5 U.S.C. § 706, requires that the reviewing court hold unlawful and set aside agency findings found to be unsupported by substantial evidence in cases reviewed on the record of an agency hearing as

required by statute.

Similarly, at the stage of intra-agency review, the full Board is required by the provisions of the Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.49 to determine whether or not the Administrative Law Judge's findings of fact are each supported by a preponderance of reliable, probative and substantial evidence.

In Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 493 (1951), this Court stated, in reference to similar language in the statutes governing the proceedings of the National Labor Relations Board:

> It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record. . .

In that case, this Court, at 497, remanded that case to the court of

appeals to answer "the comprehensive question whether the evidence supporting the Board's order is substantial."

More recently, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1970) this Court has confirmed that that provision of the Administrative Procedure Act cited above requires the court of appeals, upon review of agency action, to make a specific finding of compliance with the standards enumerated in the Act. In Illinois Central R. Co. v. Norfolk & W. R. Co., 385 U.S. 57, 66 (1966) this Court held that on its review of the decision of a court of appeals in an action for judicial review of administrative agency proceedings the opinion of the court below must lead this Court to conclude that the lower court was applying the test of substantiality.

Similarly, in Alsbury v. United States Postal Service, 392 F. Supp. 71, 74 (C.D. Cal. 1975); aff'd, 530 F.2d 852 (9th Cir. 1976, cert. denied, 97 S. Ct. 85 (1977), it is noted that:

> More recently, however, the trend has been to enlarge the judicial review test to require a judicial finding that the agency's factual determinations were and are "supported by substantial evidence." (Emphasis supplied)

This Court, in N. L. R. B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), noting that substantial evidence is more than a scintilla, but may be less than a preponderance, stated:

> It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> * * *
>
> . . . enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn

from it is one of fact for the jury.

The primary responsibility of the courts of appeals in applying the "substantial evidence" test to agency adjudicatory proceedings is to assure that due process guarantees has been afforded the citizen and to prevent "rubber-stamping" of administrative hearings which could allow or encourage such hearings to deteriorate into mere ritualistic charades.

Yet, in the present case, the Court of Appeals refused to independently evaluate the substantiality of the evidence supporting one of the two violations charged (the allegation that the aircraft was not properly equipped), because it chose to characterize this as a question of credibility of the witness within the exclusive province of the Administrative Law Judge.

This is an especially crucial question in the present case, since the testimony of that witness was the only evidence to support a finding of one of the two violations alleged (that relating to the adequacy of the equipment on board the aircraft). Indeed, the testimony of the witness was so inadequate that it would be tantamount to a situation in which a witness in a murder case were to testify, without foundation, "Yes, I saw the defendant murder Mr. Brown", and then be utterly unable to answer any other questions or recall any of the facts and circumstances surrounding the fact stated in such a bare-faced allegation.

To allow the Court of Appeals to abdicate its statutory responsibility to independently examine the substantiality of the evidence would clearly vitiate

any hopes of citizens whose rights are entrusted to administrative agencies for adjudicatory determination of receiving the benefits of due process. Permitting such neglect by the lower courts would make a mockery of the entire constitutional and statutory scheme for protection of individual liberties and flies in the face of this Court's considerable body of meticulously-reasoned decisions in the area of administrative due process.

CONCLUSION

The decision of the Tenth Circuit in this case has decided a federal question in a way in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the National Transportation Safety Board as

to call for an exercise of this Court's power of supervision. For these reasons, this Court should review this case on writ of certrorari.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that I have this ____ day of October, 1977 placed a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and Appendix in the United States Mail, postage prepaid thereon, addressed to: Morton Hollander and Allen H. Sachsel, Attorneys for Respondent, Department of Justice, Civil Division, Appellate Section, Washington, D.C. 20530